Saujana Resort (M) Bhd v Chin Cheen Foh & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(A)-2227–10 OF 2018 AND W-02(NCC)(A)-2282–11 OF 2018
BADARIAH SAHAMID, LAU BEE LAN AND VAZEER ALAM JJCA
1 DECEMBER 2020

Companies and Corporations — Shares — Issuance of offer for share subscription — Plaintiffs sought to declare issuance or offer of shares in 1985 as constituting 'scheme' under Interest Schemes Act 2016 — Whether Interest Schemes Act 2016 had retrospective application to club membership scheme

These two appeals ie Appeal 2227 was filed by the defendant in the original action, Saujana Resort (M) Bhd ('Saujana'); and Appeal 2282 was filed by the plaintiffs in the original action ('the plaintiffs'). Saujana was incorporated to own and operated the Saujana Golf and Country Club ('the Club'). The issued and paid up share capital of Saujana consisted of 15,300 Class A shares and 3,800 Class B shares. In April and May 1985, in compliance with the provisions of the Companies Act 1965, Saujana made restricted offers, by invitation only, to selected members to subscribe 1,000 Class B shares. Membership of the Club was derived exclusively from ownership of Class B shares, who may opt-in to become members of the Club. The plaintiffs, who were holders of Class B Shares, purchased their Class B shares from the existing shareholders between 1999 and 2004, and opted to become members of the Club. In 2017, Saujana's Board of Directors had approved a 100% increase of the monthly subscription fees from RM250 to RM500. Some members, including the plaintiffs, were dissatisfied with this increase. Subsequently at a 'townhall meeting', some of the Class B shareholders were of the opinion that their shareholding would constitute an 'interest scheme' under the Interest Schemes Act 2016 ('the Act'). Saujana, however, took the position that the Act was not applicable to the Club and as such no registration under the Act was required. The plaintiffs moved the High Court through its originating summons to primarily declare the issuance or offer of the Class B shares in 1985 as constituting a 'scheme' under the Act and sought: (a) a declaration that the issuance or offer to the public by Saujana of its Class B shares with the attached right to membership of the Club constituted a scheme within the meaning of ss 2 and 4 of the Act; (b) a declaration that the plaintiffs and/or all Class B shareholders of Saujana were interest holders in the scheme pursuant to s 2 of the Act; and (c) a declaration that Saujana's increase of monthly subscription for membership of the Club was in breach of the Act and was accordingly null and void. The learned judicial commissioner ('JC') allowed prayer 2 declaring

that the plaintiffs and/or all Class B shareholders of Saujana were interest holders in the scheme pursuant to s 2 of the Act and dismissed the remainder of the prayers. Hence, the appeals by Saujana against the declaration by the JC and by the plaintiffs against the dismissal of the rest of the prayers. The issue for determination was whether the Act had retrospective application to the Club membership scheme, in which the Class B shareholders were entitled to participate.

Held, allowing Appeal 2227 and dismissing Appeal 2282:

(1) Class B Shares clearly fell within the definition of an 'unlisted recreation club'. The Act governed only schemes relating to interest as defined in the Act. Section 2 of the Act showed that shares in a corporation were expressly excluded from the definition of interest. In Saujana's scheme, there was no requirement of an 'investment' by the plaintiffs, or for that matter any Class B shareholder, to acquire 'interest' or 'right' in respect of property. This was also made clear in the Club Rules, which was a contract inter se between the members and Saujana. Hence, the right to Club membership acquired through the ownership of Saujana's Class B shares could not be equated to an investment scheme as envisaged in the Act. Therefore, Saujana had always regulated its affairs vis a vis the Class B shareholders within the statutory framework under the Companies Act 1965 and the Companies Act 2016 (see paras 31–33 & 35).

(2) The provisions in the Act clearly created, conferred and imposed fresh legal rights and duties on the parties, and the substantive rights must, in the absence of express provisions, be prospective. Further, the provisions in Part III, IV, V and VII of the Act would have a significant effect on the pre-existing arrangements between the parties, and would affect the rights of Class A and Class B shareholders. Hence, any retrospective operation of the Act would substantially impair the existing rights or obligations. Therefore, the Act should be prospective and not retrospective. The saving provision in s 92(5) of the Act was very clear, precise and unambiguous in that all rights, privileges, obligations and liabilities acquired before the coming into force of the Act remain unaffected. Thus, the Act was to be applied prospectively and any rights accrued before the coming into force of the Act was preserved. The Act, Companies Act 1965 and Companies Act 2016 must be interpreted harmoniously to avoid absurdity. The plaintiffs could not rely on the Act, which did not have any retrospective effect, to change the nature and character of their shareholding. In the premise, the learned JC's finding that the Class B shares of Saujana related to an interest scheme to which the Act applied, was wrong. Thus such a declaration ought not to have been made. To that extent, Saujana's appeal in Appeal 2227 was allowed and the declaratory order was set aside (see paras 37–41).

(3) The Class B shareholders who elected not to be members of the Club, and who had no rights to enjoy the Club's facilities, could not be deemed 'interest holders' under a 'recreational membership scheme'. Not every Class B shareholder had automatic membership rights in the Club. The order sought by only five Class B shareholders, and allowed by the High Court, had affected the rights of all Class B shareholders, including those who were not members of the Club. To that extent, the learned JC had erred in allowing prayer 2 of the originating summons, and declaring all Class B shareholders were interest holders in a 'scheme' under the Act. Such as declaration would effectively later and affect the rights of the Class B shareholders who had chosen not to be members of the Club, and who were, more importantly, not before the court as parties. They had not been heard on the matter (see paras 42–43).

(4) The orders sought to compel registration of the scheme under s 2 of the Act entailed various acts to be carried out under various sections of the Act. This would require continued supervision of the court. The court would not make orders requiring continuous supervision of actions and conduct of parties, particularly if such orders would affect other members. In the premise, the learned JC was right in rejecting the application for a declaration that Saujana's increase of monthly subscription fees of the Club from RM250 to RM500 was null and void on the basis that it was in breach of the Act. There was no breach of the Act by Saujana, as the Act did not apply (see paras 45–47).

[Bahasa Malaysia summary

Kedua-dua rayuan ini iaitu Rayuan 2227 difailkan oleh defendan dalam tindakan asal, Saujana Resort (M) Bhd ('Saujana'); dan Rayuan 2282 difailkan oleh plaintif dalam tindakan asal ('plaintif'). Saujana ditubuhkan untuk memiliki dan mengendalikan Kelab Golf dan Desa Saujana ('Kelab'). Modal saham terbitan dan berbayar Saujana terdiri daripada 15,300 saham Kelas A dan 3,800 saham Kelas B. Pada bulan April dan Mei 1985, sesuai dengan peruntukan Akta Syarikat 1965, Saujana membuat tawaran terhad, dengan jemputan sahaja, kepada ahli terpilih untuk melanggan 1,000 saham Kelas B. Keahlian Kelab diperoleh secara eksklusif dari pemilikan saham Kelas B, yang boleh memilih untuk menjadi ahli Kelab. Plaintif, yang merupakan pemegang Saham Kelas B, membeli saham Kelas B mereka dari pemegang saham yang ada antara tahun 1999 dan 2004, dan memilih untuk menjadi ahli Kelab. Pada tahun 2017, Lembaga Pengarah Saujana telah meluluskan kenaikan 100% yuran langganan bulanan daripada RM250 kepada RM500. Sebilangan ahli, termasuk plaintif, tidak berpuas hati dengan kenaikan ini. Seterusnya pada 'mesyuarat townhall', beberapa pemegang saham Kelas B berpendapat bahawa pemegangan saham mereka akan menjadi 'skim kepentingan' di bawah Akta Skim Kepentingan 2016 ('Akta'). Saujana, bagaimanapun, mengambil keputusan bahawa Akta tersebut tidak terpakai untuk Kelab dan dengan itu

tidak diperlukan pendaftaran di bawah Akta tersebut. Plaintif menggesa Mahkamah Tinggi melalui saman pemula untuk mengisytiharkan penerbitan atau tawaran saham Kelas B pada tahun 1985 sebagai 'skim' di bawah Akta dan memohon: (a) perisytiharan bahawa penerbitan atau tawaran saham Kelas B oleh Saujana kepada orang awam dengan hak yang dilampirkan untuk menjadi ahli Kelab merupakan skim dalam maksud ss 2 dan 4 Akta; (b) perisytiharan bahawa plaintif dan/atau semua pemegang saham Kelas B Saujana adalah pemegang kepentingan dalam skim tersebut berdasarkan s 2 Akta; dan (c) perisytiharan bahawa kenaikan langganan bulanan Saujana untuk keahlian Kelab telah melanggar Akta dan dengan itu batal dan tidak sah. Pesuruhjaya Kehakiman yang bijaksana ('JC') membenarkan permohonan 2 dengan menyatakan bahawa plaintif dan/atau semua pemegang saham Kelas B Saujana adalah pemegang kepentingan dalam skim ini berdasarkan s 2 Akta dan menolak permohonan lain. Oleh itu, rayuan oleh Saujana terhadap pengisytiharan oleh JC dan oleh plaintif terhadap penolakan permohonan lain. Isu untuk pertimbangan adalah sama ada Akta mempunyai pemakaian retrospektif terhadap skim keahlian Club, di mana pemegang saham Kelas B berhak untuk turut serta.

Diputuskan, membenarkan rayuan 2227 dan menolak rayuan 2282:

(1) Saham Kelas B jelas berada dalam definisi 'kelab rekreasi yang tidak tersenarai'. Akta hanya mempengaruhi skim yang berkaitan dengan kepentingan sebagaimana yang ditentukan dalam Akta. Bahagian 2 Akta menunjukkan bahawa saham dalam sebuah syarikat secara eksklusif dikecualikan daripada definisi kepentingan. Dalam skim Saujana, tidak ada syarat 'pelaburan' oleh plaintif, atau dalam hal ini mana-mana pemegang saham Kelas B, untuk memperoleh 'kepentingan' atau 'hak' berkenaan dengan harta. Ini juga diperjelaskan dalam Peraturan Kelab, yang merupakan kontrak antara ahli dan Saujana. Oleh itu, hak keahlian Kelab yang diperoleh melalui pemilikan saham Kelas B Saujana tidak dapat disamakan dengan skim pelaburan seperti yang digambarkan dalam Akta. Oleh itu, Saujana telah mengawal selia urusannya dengan pemegang saham Kelas B dalam kerangka statutori di bawah Akta Syarikat 1965 dan Akta Syarikat 2016 (lihat perenggan 31–33 & 35).

(2) Peruntukan dalam Akta ini dengan jelas membuat, memberikan dan mengenakan hak dan kewajipan baru kepada pihak, dan hak-hak substantif harus, jika tidak ada peruntukan yang jelas, menjadi prospektif. Selanjutnya, peruntukan dalam Bahagian III, IV, V dan VII Akta akan memiliki pengaruh yang signifikan terhadap pengaturan yang sudah ada antara pihak, dan akan mempengaruhi hak pemegang saham Kelas A dan Kelas B. Oleh itu, apa-apa operasi retrospektif Akta akan menjejaskan hak atau tanggungjawab yang ada. Sehubungan dengan itu, Akta tersebut harus bersifat prospektif dan bukan retrospektif. Peruntukan kecualian dalam s 92(5) Akta sangat jelas, tepat dan nyata

mengenai semua hak, hak istimewa, kewajipan dan liabiliti yang diperoleh sebelum penguatkuasaan Akta tetap tidak terpengaruh. Oleh itu, Akta harus dipakai secara prospektif dan segala hak yang terakru sebelum penguatkuasaan Akta tersebut dipelihara. Akta, Akta Syarikat 1965 dan Akta Syarikat 2016 mesti ditafsirkan secara harmoni untuk mengelakkan tidak munasabahnya. Plaintif tidak boleh bergantung pada Akta, yang tidak mempunyai kesan retrospektif, untuk mengubah sifat dan perwatakan pegangan saham mereka. Dengan itu, penemuan JC yang bijaksana bahawa saham Saujana Kelas B berkaitan dengan skim kepentingan yang digunakan oleh Akta tersebut, adalah salah. Oleh itu, perisytiharan seperti itu tidak seharusnya dibuat. Dengan sedemikian itu, rayuan Saujana dalam Rayuan 2227 dibenarkan dan perintah perisytiharan diketepikan (lihat perenggan 37–41).

(3) Pemegang saham Kelas B yang memilih untuk tidak menjadi ahli Kelab, dan yang tidak mempunyai hak untuk menikmati kemudahan Kelab, tidak boleh dianggap sebagai 'pemegang kepentingan' di bawah 'skim keahlian rekreasi'. Bukan setiap pemegang saham Kelas B mempunyai hak keahlian automatik di Kelab. Perintah yang dipohon oleh hanya lima pemegang saham Kelas B, dan dibenarkan oleh Mahkamah Tinggi, telah mempengaruhi hak semua pemegang saham Kelas B, termasuk mereka yang bukan ahli Kelab. Oleh itu, JC yang bijaksana telah terkhilaf dalam membenarkan permohonan 2 saman pemula, dan menyatakan semua pemegang saham Kelas B adalah pemegang kepentingan dalam 'skim' di bawah Akta. Perisytiharan sedemikian akan memberi kesan dan mempengaruhi hak pemegang saham Kelas B yang telah memilih untuk tidak menjadi ahli Kelab, dan yang lebih penting lagi, bukan di hadapan mahkamah sebagai pihak. Mereka belum didengar mengenai perkara itu (lihat perenggan 42–43).

(4) Perintah yang dipohon untuk memaksa pendaftaran skim di bawah s 2 Akta memerlukan pelbagai tindakan yang harus dilakukan di bawah pelbagai seksyen dalam Akta tersebut. Ini memerlukan pengawasan berterusan daripada mahkamah. Mahkamah tidak akan membuat perintah yang memerlukan pengawasan berterusan terhadap tindakan dan kelakuan pihak, terutama jika perintah tersebut akan mempengaruhi anggota lain. Dengan itu, JC yang bijaksana betul dalam menolak permohonan perisytiharan bahawa kenaikan oleh Saujana terhadap yuran langganan bulanan Kelab daripada RM250 menjadi RM500 adalah batal dan tidak sah kerana ia melanggar Akta. Tidak ada pelanggaran Akta oleh Saujana, kerana Akta tersebut tidak terpakai (lihat perenggan 46–47).]

Cases referred to

Chia Saw Kee & Anor v Huah Leong Holdings Sdn Bhd & Anor [2003] 8 CLJ 124, HC (refd)

Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors [1996] 2 MLJ 206; [1996] 4 CLJ 141, CA (refd)
Ibeneweka v Egbuna [1964] 1 WLR 219, PC (refd)
Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals [2020] 1 MLJ 311; [2020] 1 CLJ 193, FC (refd)
Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal [2020] 1 MLJ 174, FC (refd)
Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 2 ILR 230, FC (refd)
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General Of Trade Unions & Ors [1990] 3 MLJ 231; [1990] 2 CLJ Rep 218; [1990] 2 CLJ 405, HC (refd)
Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23; [1997] 4 CLJ 253, FC (refd)
Lembaga Pembangunan Langkawi v Smart Unity Sdn Bhd [2017] MLJU 348; [2017] 7 CLJ 450, CA (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)
London Passenger Transport Board v Moscrop [1942] AC 332, HL (refd)
Mak Siew Wei v Yeoh Eng Kong and other appeals [2020] 1 MLJ 258; [2019] 7 CLJ 470, CA (refd)
NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia [2010] 5 MLJ 573, FC (refd)
National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)
Ng Chong Wee v Ng Chong Geng & Sons Sdn Bhd [2018] MLJU 934; [2018] 1 LNS 967, CA (refd)
Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah [2018] 12 MLJ 49; [2018] 8 CLJ 273, FC (refd)
PP v Yuneswaran a/l Ramaraj [2015] 6 MLJ 47; [2015] 9 CLJ 873, CA (refd)
Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749; [2014] 1 CLJ 207, FC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)
Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor [2008] 1 MLJ 164, CA (refd)
YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621; [1997] 4 CLJ 300, CA (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1, PC (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 2
Companies Act 1965 (repealed by Companies Act 2016) ss 84, 85, 86, 87, 88, 89, 90, 91, 92, 92(5), 93, 94, 95, 96, 97, Division 5, Part IV
Companies Act 2016 Part III, Division 1, Subdivision 9

Interest Schemes Act 2016 ss 2, 4, 19, 20, 22, 23, 24, 27, 28, 29, 31, 32, 39, 40, 45, 46, 47, 49, 51, 55, 66, 76, 77, 78, 92(5), Part III, Chapters 1, 2, 3, Part IV, Chapters 1, 2, 3, Parts V, VII

Appeal from: Originating Summon No WA-24NCC-299–06 of 2018 (High Court, Kuala Lumpur)

DP Naban (Bahari Yeow and Alex Choo with him) (Rosli Dahlan Saravana Partnership) for the appellant.
Alan Adrian Gomez (Mervyn Lai with him) (Tommy Thomas) for the respondents.

Vazeer Alam JCA:

INTRODUCTION

[1] There are two appeals before this court, arising from the same judgment of the High Court, and they are:

(a) Appeal No W-02(NCC)(A)-2227–10 of 2018 ('Appeal 2227') filed by the defendant in the original action, Saujana Resort (M) Bhd ('Saujana'); and

(b) Appeal No W-02(NCC)(A)-2282–11 of 2018 ('Appeal 2282') filed by the plaintiffs in the original action, namely, Chin Cheen Foh, Chin Kon Meng, Lee Poi Keong, Wong Yang Kheong and Ng Hoe ('plaintiffs').

[2] The appeals arise out of an action commenced by the plaintiffs who are members of the Saujana Golf and Country Club ('Club') against Saujana, the company that owns, manages and operates the club. The plaintiffs' complaint flow mainly from the decision of the Board of Directors of Saujana to increase the monthly subscription and fees imposed on the members of the club by 100%, and their contention that the club, ought to be, but not registered, under the Interest Schemes Act 2016 ('the Act'), thus depriving its members of the attendant rights and benefits under the Act.

BACKGROUND FACTS

[3] Saujana was incorporated on 2 February 1983 to own and operate the club. The issued and paid up share capital of Saujana consists of 15,300 Class A Shares and 3,800 Class B Shares, which rank pari passu in all respects, except that:

(a) a Class B Share (but not Class A share) entitles its holder to membership of the club owned by Saujana, subject to compliance with the Club Rules;

(b) in the event Saujana is wound up, the holders of the 3,800 Class B shares are entitled to the repayment of capital in priority to the holders of the 15,300 Class A shares; and

(c) Class A shareholders are entitled to elect six directors, while Class B shareholders are entitled to elect two directors of Saujana. At the time of the filing of the originating summons, there were four Class A shares appointed directors and two Class B shares appointed directors.

[4] Since Saujana's incorporation in 1983:

(a) the promoters of Saujana had invested RM37m, which Saujana utilised to acquire 140 hectares of freehold agricultural land in the Mukim of Damansara to develop an integrated two 18-hole golf course, a clubhouse and a hotel;

(b) in April and May 1985, in compliance with provisions of the Companies Act 1965, Saujana made restricted offers, by invitation only, to selected members of the public in Malaysia and Singapore to subscribe 1,000 Class B shares pursuant to prospectuses dated 2 April 1985 and 8 May 1985 ('prospectuses'); and

(c) since after their issuance in 1985, there has been no further public issue of any Class B shares, and the number of Class B shares has remained at 1,000.

[5] The purpose of the offer of Class B shares in 1985 were:

(a) to provide selected members of the public with an opportunity to participate in the equity of Saujana, which was intended to be a profit making enterprise, as well as entitling the holders of such shares or their nominees to be members of the club;

(b) to raise additional funds, estimated to amount to approximately RM34.5m, to finance in part the development costs of projects being undertaken by Saujana, including the club; and

(c) to pay for the acquisition of an additional 20 hectares of land adjoining the club.

[6] In 1985, when the public offer of the Class B shares were made, the Act had not been enacted. The restricted offer to selected members of the public to subscribe for and/or purchase the Class B shares were made pursuant to the prospectuses in compliance with the relevant applicable provisions of the Companies Act 1965, then in force.

[7] Since the issue of the Class B shares to the selected members of the public in 1985, there has been no further public issue of any Class B shares. However,

A holders of the Class B shares were free to transfer their shares, normally through a private sale in the secondary market, or by way of transmission. The plaintiffs had acquired their Class B shares from the secondary market.

B **[8]** Membership of the club is derived exclusively from ownership of Class B shares, who may opt-in to become members of the club. However, as at 31 December 2017, out of the 3,800 Class B shares, 1,578 had opted not to be members, and merely hold the Class B shares as ordinary shareholders.

C **[9]** Subject to compliance with Club Rules, as may be laid down by Saujana's Board of Directors, and payment of monthly subscription fees for the day-to-day running and operation costs of the club, a member is entitled to use the club facilities. Pursuant to article 5(2) of Saujana's articles of association, read together with the Club Rules, the directors of Saujana have absolute D discretion with respect to the amount of monthly subscription imposed on members of the club. The monthly subscription fee and other Club charges are utilised for the day-to-day running and operations costs of the club, and are not an investment to acquire any interest or right in respect of property used or employed in common with any other interest or right.

E **[10]** Funds for major capital investments were raised through or by Saujana, by way of bank borrowings or advances from its ultimate holding company.

[11] The plaintiffs, who are holders of Class B shares, purchased their Class F B shares from existing shareholders between 1999 and 2004, and opted to become members of the club.

THE DISPUTE

G **[12]** On 21 July 2017, the plaintiff were informed that Saujana's Board of Directors had approved a 100% increase of the monthly subscription fees from RM250 to RM500. Some members, including the plaintiffs, were dissatisfied with this twofold increase. Subsequently at a 'townhall meeting' between Saujana's management and Class B shareholders to discuss the issue of H subscription fees increase, some of the Class B shareholders were of the opinion that their shareholding would constitute an 'interest scheme' under the Interest Schemes Act 2016 ('the Act'), and enquired if Saujana had taken steps to register the club with the Companies Commission of Malaysia ('CCM') as required under the Act. Saujana, however, took the position that the Act was I not applicable to the club and as such no registration under the Act was required.

[13] Being dissatisfied, the plaintiffs, through solicitors, issued a letter demanding Saujana take all necessary steps to register the club under the Act.

Saujana responded through its solicitor repeating its earlier assertion that the Act was not applicable to the club. This is essentially the primary dispute between the parties.

THE PLAINTIFF'S ORIGINATING SUMMONS

[14] The plaintiffs then, through their solicitors, requested CCM to direct Saujana to take all necessary steps to register the club under the Act. And when CCM did not act on that request, the plaintiffs moved the High Court through its originating summons to primarily declare the issuance or offer of the Class B shares in 1985 as constituting a 'scheme' under the Act, and sought the following orders and declarations:

(a) a declaration that the issuance or offer to the public by Saujana of its Class B shares with the attached right to membership of the club constitute a scheme within the meaning of ss 2 and 4 of the Act;

(b) a declaration that the plaintiffs and/or all Class B shareholders of Saujana are interest holders in the scheme pursuant to s 2 of the Act;

(c) an order that Saujana apply or take all necessary steps to apply for the registration of the scheme with the registrar as defined in s 2 of the Act, within 14 days of the order of court;

(d) an order that Saujana within the same period appoint a trustee to act for the Class B shareholders, in compliance with s 22 of the Act; and

(e) a declaration that Saujana's increase of monthly subscription for membership of the club from RM250 to RM500 with effect from September 2017 was in breach of the Act and is accordingly null and void.

THE HIGH COURT'S DECISION

[15] The learned judicial commissioner ('JC'), allowed prayer (2) declaring that the plaintiffs and/or all Class B shareholders of Saujana are interest holders in the scheme pursuant to s 2 of the Act and dismissed the remainder of the prayers in the originating summons.

[16] Saujana, vide Appeal 2227, appeals against the declaration as in prayer (2) made by the High Court; whilst the plaintiffs, vide Appeal 2282, appeal as regards the dismissal of the rest of the prayers in the originating summons. Suajana contends that the learned JC erred in allowing prayer (2) and was right in dismissing prayers (1), (3), (4) and (5). The plaintiffs contend otherwise.

ISSUES

[17] The appeals revolve mainly around the issue of the application of the Act to the Class B shares, and in particular whether the Act had retrospective application to the club membership scheme, in which the Class B shareholders were entitled to participate.

ANALYSIS OF THE ARGUMENTS

[18] The learned JC found that the Act did not have retrospective effect, and in para (48) of the grounds of judgment held that:

> 48. I would also not grant Prayer (1) of the Originating Summons which seeks a declaration that the issuance of offer to the public by the Defendant of its Class B shares with the attached rights to membership of the club constitutes a scheme within the meaning of sections 2 and 4 of the Act. This is because *the offer to the public took place in 1985 prior to the coming into force of the Act. It therefore cannot be caught within the ambit of the Act which is not stated to have retrospective effect*. (Emphasis added.)

[19] However, having made that determination on the prospective application of the Act, the learned JC went on to grant prayer (2) of the originating summons, where in para (49) of the grounds of judgement she held as follows:

> 49. Accordingly, I would grant prayer (2) of the Originating Summons and declare that the plaintiffs and all Class B shareholders of the Defendant are interest holders in the scheme pursuant to section 2 of the Act unless the Defendant succeeds in its other defences to the Originating Summons.

[20] With respect, we find this to be a contradiction in terms. Prayer (1) and (2) are inter-related. If the Act does not have retrospective application, and prayer (1) is disallowed on that score, then how could the declaration in prayer (2), to the effect that the plaintiffs and all Class B shareholders of Saujana are interest holders in the scheme pursuant to s 2 of the Act, be made by the court.

[21] As the retrospective application of the Act was a pivotal issue in these appeals, we had in the course of hearing the appeal directed counsel to file further submissions on whether the Act had retrospective application. In their further written submissions, having traversed the law and facts of the case, both counsel for the plaintiffs and Saujana came to a common position that the Act did not have retrospective application.

[22] Now, it is settled law that a statute cannot have retrospective operation unless it is clearly intended by Parliament through clear and express provisions.

See *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 (PC); *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 (SC); *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174 (FC). Accordingly, in the absence of any express provision in the Act allowing for retrospective operation, the Act only operates prospectively.

[23] In fact Parliament's Hansard shows that during the second reading of the Interest Schemes Bill 2015, a query was raised by a Member of Parliament as to the retrospectivity of the Act, which was not provided for in the Bill. However, Parliament remained silent on the issue and the Bill was passed. See: *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49; [2018] 8 CLJ 273 (FC), for the principle that reference to Hansard can be had in interpreting a statute.

[24] Further, it also trite that a statute should not be interpreted retrospectively so as to impair an existing substantive right or obligation. See: *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749; [2014] 1 CLJ 207 (FC); *Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311; [2020] 1 CLJ 193 (FC). Hence, the question to be asked is this: 'If the Act is to be applied retrospectively, would it impair existing rights or obligations'?

[25] In answering that question, a historical look at the statutory framework is imperative. The Act, which governs the framework of interest schemes in Malaysia, came into force on 31 January 2017. Prior to that, interest schemes were governed by Division 5 Part (IV), ss 84 to 97 of the Companies Act 1965, which are in pari materia with the relevant sections in the Act. See *NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia* [2010] 5 MLJ 573 (FC).

[26] In 1985, when Saujana's prospectuses were issued, the interest scheme provisions, ie ss 84–97 of the Companies Act 1965, were already in existence. Additionally, the issuance of special class of shares to the public, such as Saujana's Class B shares, was also provided for in the Companies Act 1965. Now, the prevailing law then provided two alternatives for the operation of an interest scheme, one under Division 5 Part (IV), ie ss 84–97 of the Companies Act 1965 and the other by way of public issuance of a class of shares. Saujana, being a public company, had, in order to offer and regulate the club membership, proceeded with a public offer of the Class B shares in accordance to the rules and procedure prescribed in the Companies Act 1965, as applicable then. Saujana had decided to follow the public share issuance regime to allow for and regulate membership of the club. The Registrar of Companies did not object to this course of action by Saujana. The rights of the Class B shareholders are governed by Saujana's articles of association, and the Club Rules. The Class

A B shareholders have the right to appoint two directors to Saujana's Board of Directors, and rank higher than Class A shareholders in the event of Saujana being wound up.

B **[27]** Further, the Club Rules, which the plaintiffs agree they are bound by, provides as follows:

Rule 2.0: The club is a proprietary club, owned and managed by [Saujana], with the Board of Directors entrusted with the policies, management and C operations ...

Rule 4.2: No Member shall, by reason of his Membership of the club, be under any financial liability, except for payment of his subscription and any sums due or levied under the Rules. D

Rule 4.3: No Member shall, by reason of his Membership of the club, have any proprietary rights over the club, its moneys, profits, properties and assets.

E **[28]** Now, having agreed that they do not have any proprietary rights over the club, its property and assets, the plaintiffs by seeking to register the 'scheme' under the Act are essentially endeavouring to change that rights equation and acquire rights over the club's assets and properties.

F **[29]** The evidence shows, and it is common ground, that Saujana is an 'unlisted recreational club'. Section 2 of the Capital Markets and Services Act 2007 defines an 'unlisted recreational club' as:

> 'unlisted recreational club' means a corporation which provides the holders of its G shares or debentures the right to use or enjoy any recreational, holiday or other related facilities and whose shares or debentures are not listed or proposed to be listed for quotation on any stock market of a stock exchange;

Hence, the Class B shares clearly fall within the definition of an 'unlisted H recreation club'. An 'unlisted recreation club' is now governed under Part III Division 1 Subdivision 9 of the Companies Act 2016. Hence, counsel Saujana argues that Saujana's scheme is one that would be governed and regulated by the Companies Act 2016 and not the Act. And in fact, CCM has recognised Saujana, the club and its membership as being outside the ambit of the Act, and I this is reflected in CCM's website where Saujana is categorised as an 'unlisted Golf Recreational Club' and classified as an 'unregistered scheme'. This would bring Saujana squarely within the ambit of the Companies Act.

[30] The intent and object of the Act are clear, in that it governs only

schemes relating to interest as defined in the Act. In s 2 of the Act, 'scheme' is defined as:

> 'scheme', in relation to an interest, includes any contract, arrangement, undertaking, enterprise, programmes or plans of actions relating to an investment scheme, a time-sharing scheme or a recreational membership scheme;

And s 2 of the Act defines 'interest' as:

> 'interest' means any interest or right to participate, whether enforceable or not and whether actual, prospective or contingent whether in Malaysia or elsewhere —
>
> (a) in any investment scheme;
>
> (b) in any time-sharing scheme; or
>
> (c) in any recreational membership scheme,
>
> whether or not the interest or right is evidenced by a formal document or relates to a physical asset, *but does not include* —
>
> (i) *any shares in or debenture of a corporation*; (Emphasis added.)

A reading of s 2 of the Act shows that shares in a corporation are expressly excluded from the definition of interest. The principle is that Parliament in enacting a law has complete knowledge of the existing law, and does not legislate in vain. See: *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor* [2008] 1 MLJ 164 (CA). The legislature had made clear in the Act that 'interest' excludes shares The exclusion of shares from interest schemes in the Act could be premised on the fact that there were schemes such as Saujana's which were then in existence, based on ownership of shares in a corporation.

[31] In Saujana's scheme, there is no requirement of an 'investment' by the plaintiffs, or for that matter any Class B shareholder, to acquire 'interest' or 'right' in respect of property. This is also made clear in the Club Rules, which is a contract inter se between the members and Saujana. Hence, the right to Club membership acquired through the ownership of Saujana's Class B shares cannot be equated to an investment scheme as envisaged in the Act. In fact CCM had recognised that position and therefore not acceded to the plaintiffs' request for the scheme to be registered under the Act.

[32] Further, since issuance of the Class B shares in 1985, Class B shareholders have always been treated as shareholders, and their relationship vis a vis Saujana have been regulated under the Companies Act 1965, and after its repeal under Companies Act 2016. And in particular they have:

(a) received periodic Financial Statements in compliance with the Companies Act 1965, and thereafter the Companies Act 2016;

A (b) were entitled to attend Saujana's General Meetings; and

(c) were paid dividend.

Further, it must be noted that Saujana has not at any time offered to sell to the
B public direct membership of the club. Membership of the club is only limited to the Class B shareholders, who can chose to become members at their own volition or remain merely as shareholders.

C **[33]** Therefore, it is clearly evident that Saujana has always regulated its affairs vis a vis the Class B shareholders within the statutory framework under the Companies Act 1965, and after its repeal, the Companies Act 2016. In the course of about 35 years since the issuance of the Class B shares in 1985, the parties have, within this legal framework, acquired substantive rights.

D **[34]** We agree with submissions of counsel for Saujana that there a plethora of provisions in the Act which clearly impose and define the nature and extent of legal duties which affect existing substantive rights. These would include:

(a) Part III, Chapter 1 of the Act provides, inter alia:

E (i) application for registration of the scheme requires an approved trust deed and contractual agreement: s 19 of the Act;

(ii) contents of trust deeds and contractual agreement: s 20 of the Act;

F (b) Part III, Chapter 2 of the Act provides, inter alia:

(i) mandatory appointment of trustees: s 22 of the Act;

(ii) duties of trustees: s 23 of the Act;

(iii) liability of trustees: s 24 of the Act;

G (c) Part III, Chapter 3 of the Act provides, inter alia:

(i) prohibition of issuance of offer to public subscription of any interest without there being in force an approved trust deed or an approved contractual agreement (as the case may be): s 27 of the
H Act;

(ii) requirement to register and lodge prospectus or product disclosure statement before its circulation: s 28 of the Act;

(iii) requirements to obtain registration of a prospectus or product
I disclosure statement: s 29 of the Act;

(iv) management company's obligation to keep records: s 31 of the Act;

(v) contents of prospectus or product disclosure statement: s 32 of the Act;

(vi) civil liability for misstatement in prospectus or product disclosure statement: s 39 of the Act;

(vii) criminal liability for misstatement in prospectus or product disclosure statement: s 40 of the Act;

(d) Part IV, Chapter 1 of the Act provides, inter alia:

(i) general duties and obligations of management company: s 45 of the Act;

(ii) obligations to trustees: s 46 of the Act;

(iii) duty to buy back interests: s 47 of the Act;

(iv) prohibition to invest and lend money to management company: s 49 of the Act;

(e) Part IV, Chapter 2 of the Act provides, inter alia:

(i) obligation of a management company to keep accounting records: s 51 of the Act;

(f) Part IV, Chapter 3 of the Act provides, inter alia:

(i) obligation of a management company to call for a meeting when requisitioned by interest holders: s 55 of the Act;

(g) Part V of the Act provides, inter alia:

(i) duties of a management company in winding up of a scheme: s 66 of the Act;

(h) Part VII of the Act provides, inter alia:

(i) obligation of a management company to keep a register of the interest holders: s 76 of the Act;

(ii) obligation of a management company to lodge returns and statements within two months after end of each financial year: s 77 of the Act; and

(iii) obligation of a management company to keep documents at its registered office: s 78 of the Act.

[35] These provisions of the Act clearly create, confer and impose fresh legal rights and duties on the parties, and these substantive rights must, in the absence of express provisions, be prospective. Further, the provisions in Part III, IV, V and VII of the Act would have a significant effect on the pre-existing arrangements between the parties, and would affect the rights of Class A and Class B shareholders. Hence, any retrospective operation of the Act would substantially impair existing rights or obligations. Therefore, the Act should be prospective and not retrospective.

[36] Our view is further fortified by the saving provision in s 92(5) of the Act, which provides:

> (5) Any rights, privileges, obligations or liabilities acquired, accrued or incurred before the commencement of this Act or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this Act has not been enacted.

A saving provision narrows the application of a new act or an amendment and not enlarge it. The object of a saving provision is clear enough that it is not to interfere with existing rights. See: *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (FC); *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 (FC). Section 92(5) of the Act is very clear, precise and unambiguous in that all rights, privileges, obligations and liabilities acquired before the coming into force of the Act remain unaffected. Thus, the Act is to be applied prospectively, and any rights accrued before the coming into force of the Act is preserved. See: *Ng Chong Wee v Ng Chong Geng & Sons Sdn Bhd* [2018] MLJU 934; [2018] 1 LNS 967 (CA); *Mak Siew Wei v Yeoh Eng Kong and other appeals* [2020] 1 MLJ 258; [2019] 7 CLJ 470 (CA).

[37] We are clear in our minds that the Act, Companies Act 1965, and Companies Act 2016 must be interpreted harmoniously to avoid absurdity. See: *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47; [2015] 9 CLJ 873 (CA). This harmony can be achieved if:

(a) the Act is construed to govern 'schemes' relating to 'interests' only as defined under the Act, excluding shares in a corporation; and

(b) the rights and interest in respect of the Class B shares are continued to be governed, originally under Companies Act 1965 and now under Companies Act 2016.

[38] The plaintiffs having conceded that the Act only operates prospectively, cannot move the court to declare the Class B shares issued in 1975 constitute a 'scheme' under the Act. Such a declaration would alter the very nature and character of Class B shares from its original to one of a different nature and character all together. The plaintiffs cannot rely on the Act, which does not have any retrospective effect, to change the nature and character of their shareholding.

[39] In the premise of the foregoing, we find the learned JC's finding in para 37 of the grounds of judgment, that the Class B shares of Saujana relate to an interest scheme to which the Act applies, is, with respect, wrong. The declaration as per prayer (2) of the originating summons was made based on this erroneous finding, and thus we find that such a declaration ought not to

have been made. To that extent, we allowed Saujana's appeal in Appeal 2227 and set aside that declaratory order.

[40] Further, the Class B shareholders who elected not to be members of the club, and who have no rights to enjoy the club's facilities, cannot be deemed 'interest holders' under a 'recreational membership scheme' as found by the learned JC. We agree with Saujana's contention that not every Class B shareholder has automatic membership rights in the club. If Class B shareholders do not pay the monthly fee they do not enjoy the right to use the club facilities. However, the learned JC in allowing the declaration as in prayer (2) has construed all Class B shareholders as holders of 'interest' under the Act, whether they elected to members of the club and paid the monthly subscription or not. The order sought by only five Class B shareholders, and allowed by the High Court, has affected the rights of all Class B shareholders, including those who are not members of the club.

[41] To that extent, we find that the learned JC had erred in allowing prayer (2) of the originating summons, and declaring all Class B shareholder (whether participating in the scheme or otherwise) are interest holders in a 'scheme' under the Act. Such as declaration would effectively later and affect the rights of the Class B shareholders who had chosen not to be members of the club, and who were, more importantly, not before the court as parties. They have not been heard on the matter. It is trite that in an application for declaration, all parties who would potentially be affected by such an order must be before the Court. An action for a declaration is an important device for ascertaining and determining the rights of parties. And it is settled that when a declaratory order is sought, all interested parties must be before the court. See dicta of Viscount Maugham in *London Passenger Transport Board v Moscrop* [1942] AC 332 at p 345 (HL) which was adopted by the Supreme Court in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23 at p 45; [1997] 4 CLJ 253 at p 282 vide Lord Radcliffe's observation in *Ibeneweka v Egbuna* [1964] 1 WLR 219 at p 226. See also *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206; [1996] 4 CLJ 141 (CA); *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General Of Trade Unions & Ors* [1990] 3 MLJ 231; [1990] 2 CLJ Rep 218; [1990] 2 CLJ 405; (HC); and *Chia Saw Kee & Anor v Huah Leong Holdings Sdn Bhd & Anor* [2003] 8 CLJ 124 (HC) for an application of this principle.

[42] Additionally, under the Act, the 'Management Company' shall, at the request of an interest holder, purchase any interest from the interest holder. However, Saujana as a company incorporated under the Companies Act 1965, and now governed under the Companies Act 2016, can only buy back its own shares if they are quoted on a stock exchange. Such buy back, or providing

financial assistance in connection with the purchase of its own shares is an offence that Saujana would be forced to commit if it were to be declared that Saujana's Class B shares would an interest scheme under the Act. This cannot be the intention of Parliament when enacting the Act. The court is under a duty to interpret the law and adopt an approach that produces neither injustice or absurdity. See: *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 2 ILR 230 (FC).

The refusal of registration and prayers (1), (3), (4) and (5)

[43] The learned JC had refused to grant prayers (1), (3) and (4) of the originating summons, ie for the following orders:

(a) that the issuance or offer to the public by Saujana of its Class B shares with the attached right to membership of the club be declared to constitute a scheme within the meaning of ss 2 and 4 of the Act;

(b) that Saujana apply or take all necessary steps to apply for the said registration of the scheme with the registrar as defined in s 2 of the Act, within 14 days of the order of court; and

(c) that Saujana within the same period appoint a trustee to act for the Class B shareholders, in compliance with s 22 of the Act.

[44] Counsel for the plaintiffs contends that, in addition to prayer (2), these orders ought to have been allowed. However, we do not find any error on the part of the learned JC in rejecting the application for these orders. Apart from the fact that the Act is retrospective in its application, thus putting Saujana and its shares outside ambit of the Act; the orders sought to compel registration of the scheme under s 2 of the Act entails various acts to be carried out under various sections of the Act. These include the incorporation of a management company, appointment of its directors, secretary and auditor, appointing trustees and approval of the appointment, forming the trust, preparation of trust deed and contractual terms. This would require continues supervision of the court. It is settled law that the court will not make orders requiring continuous supervision of actions and conduct of parties, particularly if such orders would affect other members. See: *Lembaga Pembangunan Langkawi v Smart Unity Sdn Bhd* [2017] MLJU 348; [2017] 7 CLJ 450 (CA); *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300 (CA).

[45] In the premise, we find that the learned JC was right in rejecting the application in prayer (5) of the originating summons for a declaration that Saujana's increase of monthly subscription fees of the club from RM250 to RM500 with effect from September 2017 was null and void on the basis that

was in breach of the Act. There is no breach of the Act by Saujana, as the Act does not apply.

CONCLUSION

[46] For the above reasons, we unanimously allowed Appeal 2227 and dismissed Appeal 2282 with global costs of RM35,000 here and below.

Appeal 2227 allowed and Appeal 2282 dismissed.

Reported by Nabilah Syahida Abdullah Salleh